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No. 85-279

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN PETROFINA COMPANY OF TEXAS,
PETITIONER

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL
UNION LOCAL NO. 4-23 AND LEO MAX HILDABRIDLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the parties to a labor contract must submit a grievance to an arbitrator whenever there is "some possibility" that the grievance is arbitrable, so that the arbitrator may decide in the first instance whether the grievance is in fact arbitrable under the parties' contract.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 759 F.2d 512. The opinion of the district court (Pet. App. A7-A17) is reported at 586 F. Supp. 643.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1985, and a petition for rehearing was

denied on June 4, 1985 (Pet. App. A18-A19). The petition for a writ of certiorari was filed on August 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Oil, Chemical & Atomic Workers International Union Local 4-23 represented the employees at petitioner's refinery in Port Arthur, Texas, during the time period relevant in this case. The union notified petitioner in November 1981 that it planned to exercise its right to terminate the parties' collective bargaining agreement at 12:01 a.m. on January 8, 1982. Despite the parties' efforts to resolve their differences through negotiation, the agreement expired and the union went on strike. Pet. App. A2, A8.

On February 20, 1982, an incident took place involving employee Leo Hildabridle, one of the striking employees picketing the refinery. Guards employed by petitioner alleged that Hildabridle threatened them with a knife.[1] Petitioner investigated the incident and decided to discharge Hildabridle. Petitioner notified Hildabridle by letter that he was terminated as of May 27, 1982. Pet. App. A8-A9.[2]

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[1] Hildabridle was charged with a misdemeanor, but was found not guilty after a jury trial (Pet. App. A2, A9 & n.1).

[2] During petitioner's investigation of the incident, it contacted union officials in order to schedule an informal hearing at which Hildabridle could present his version of the events of February 20. Hildabridle's attorneys responded that Hildabridle would not attend the hearing unless they could be present. The attorneys further stated that the grievance and arbitration procedure established under the collective bargaining agreement was no longer in effect due to the expiration of that agreement. Pet. App. A9.

The union demanded arbitration of the discharge pursuant to the expired collective bargaining agreement; petitioner refused to submit the dispute to arbitration (Pet. App. A2). The union then filed unfair labor practice charges with the National Labor Relations Board (NLRB) alleging that the discharge was motivated by Hildebridle's union activity. The NLRB regional director refused to issue a complaint, the general counsel upheld that determination, and the charges accordingly were dismissed. *Id.* at A9.

Hildabridle's discharge also became an issue in the contract negotiations. Petitioner rejected the union's demands that Hildabridle be reinstated or, in the alternative, that the matter be submitted to arbitration. On December 20, 1982, petitioner and the union signed a back-to-work agreement and a new collective bargaining agreement. The new collective bargaining agreement contained grievance and arbitration provisions as well as a clause prohibiting discharges without just cause. The back-to-work agreement contained a provision recording the parties' differing views regarding Hildabridle's discharge. The agreement stated that "[t]he Union's position is that such action is subject to the grievance and arbitration provisions and the Company's position is that it is not." Pet. App. A2-A3.

The union subsequently filed a grievance under the new contract alleging that Hildabridle had been discharged without just cause; petitioner refused to submit the grievance to arbitration. The union and Hildabridle then commenced this action in the United States District Court for the Eastern District of Texas under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. They sought an order compelling petitioner to arbitrate the dispute concerning Hildabridle's discharge. Pet. App. A10.

The district court concluded that the dispute was not subject to arbitration and entered judgment for petitioner (Pet. App. A7-A17). The court first rejected respondents' contention that the arbitration clause of the expired contract applied to Hildabridle's discharge. The court observed that in *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), this Court held that the parties' duty to arbitrate a dispute over severance pay did not lapse upon termination of the collective bargaining agreement. The district court in the present case concluded that arbitration may be compelled under the arbitration provision of an expired contract when the dispute "involves the accrued rights of employees, such as pension benefits or disability payments" or when the dispute "centers around an event that took place either totally or in part during the term of the contract" (Pet. App. A12). The court also noted that "[a]n event can be construed as occurring within a contract when the contract terms are deemed to continue past the contract's formal expiration date" (*ibid.*).

The court found, however, that the contract right asserted by Hildabridle—the right to be discharged only for cause—was not an accrued right analogous to pension benefits or severance pay. The court also determined that the events giving rise to the dispute in this case did not arise during the term of the contract and found no evidence that the parties intended to maintain the contract terms in force after the expiration of the contract. The court therefore concluded that petitioner had no duty under the expired contract to arbitrate the dispute concerning Hildabridle's discharge. Pet. App. A12-A14.

The court also rejected respondents' claim that Hildabridle's discharge did not become effective until December 20, 1982, the date of the new contract, and that the discharge therefore was arbitrable under the new contract. It stated that "a dispute over events that occurred prior to the execution of a collective bargaining agreement is not arbitrable where it is clear [that] the parties did not agree to arbitrate [the dispute]" (Pet. App. A15). The court observed that the back-to-work agreement contained an express reservation of petitioner's position that the dispute over Hildabridle's discharge was not arbitrable, and it concluded that arbitration of the dispute was not required under the new contract.

2. The court of appeals took a different view of the legal issue in this case and reversed the district court (Pet. App. A1-A6). The court of appeals stated that "[w]hat is critical to the resolution of the appeal in this case is the firm recognition by the courts that they lack authority to decide at this stage of a controversy such as this whether the grievance procedure and arbitration process provided for in the new contract is applicable to Hildabridle's discharge" (*id.* at A4). The court of appeals stated that "[a]ll the Union needs to show to remove from the courts the power to decide whether this grievance is arbitrable * * * is that there is at least some possibility that it is. Whether this dispute is arbitrable under the new contract is an issue that the parties must submit in the first instance to the arbitrator" (*ibid.*).

Applying this test to the facts of the present case, the court of appeals concluded that the district court erred in refusing to issue an order compelling arbitration because "[i]t cannot be said with 'positive assurance' that the arbitration clause in the new contract cannot be applicable to this dispute" (Pet.

App. A5). The court observed that "[a]s a general rule, 'an employer may not discharge an economic striker,' " and found that "[t]o the extent that federal labor law protects his employment, therefore, the striker remains an 'employee' until the strike ends. It follows that until there is an adjudication of a company's right to fire an economic striker he remains an employee" (*id.* at A3-A4 (citations and footnote omitted)).

The court stated that in the present case, "because Hildabridle was an economic striker, and there had been no adjudication of a right to discharge him during the strike, he remained an employee. He was not effectively discharged until the company refused to reinstate him when the new contract went into effect" (Pet. App. A5). Therefore, the court concluded, "[i]t is up to the arbitrator * * * to decide in the first instance whether the grievance procedure and arbitration promise in the new contract are applicable to Hildabridle's discharge" (*ibid.*).[3] The court also found that "[t]he fact * * * that the parties themselves agreed to disagree about whether the dispute was arbitrable" was a sufficient reason to "require submission of the issue of arbitrability to the arbitrator" (*id.* at A6).

DISCUSSION

The court of appeals plainly erred in directing the parties to allow an arbitrator to decide whether their dispute is subject to arbitration. This Court held in

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[3] The court noted that the NLRB is authorized "to decide whether there was justification for firing a striker during an economic strike" (Pet. App. A5). It concluded, however, that this jurisdiction "does not bar an obligation to arbitrate the same dispute" and that the NLRB's refusal to issue a complaint in this case "is not controlling" (*ibid.*).

AT&T Technologies, Inc. v. *Communications Workers of America*, No. 84-1913 (Apr. 7, 1986), that "the court, not the arbitrator [must] decide in the first instance whether the [labor] dispute [is] to be resolved through arbitration" (slip op. 8). Thus, the court below was in error when it concluded that "[i]t is up to the arbitrator * * * to decide in the first instance whether the grievance procedure and arbitration promise in the new contract are applicable to Hildabridle's discharge" (Pet. App. A5). This Court accordingly should vacate the judgment and remand the case to the court of appeals so that it may review the merits of the district court's determination regarding the arbitrability of the parties' dispute.

Furthermore, although the Court need not reach the question in the present case, the court of appeals' limited analysis of the merits of the arbitrability question is incorrect. The court ignored the proper inquiry—whether the parties agreed to submit the dispute to arbitration—and based its finding that "[i]t cannot be said with 'positive assurance' that the arbitration clause in the new contract cannot be applicable to this dispute" (Pet. App. A5) upon an erroneous interpretation of the National Labor Relations Act. We submit that the statute is not determinative of the arbitrability issue; the question whether the dispute is arbitrable turns solely upon the meaning of the agreements between petitioner and the union.

1. In *AT&T Technologies, Inc.* v. *Communications Workers of America, supra*, this Court considered "whether a court asked to order arbitration of a grievance filed under a collective-bargaining agreement must first determine that the parties intended to arbitrate the dispute, or whether that determina-

tion is properly left to the arbitrator" (slip op. 1). The Court stated that "the question of arbitrability —whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator" (*id.* at 5). The Court noted that, "where the contract contains an arbitration clause, there is a presumption of arbitrability" (*id.* at 7), but that it remains "for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration" (*id.* at 8).

The court below plainly did not apply these principles in the present case. It stated that "[a]ll the Union needs to show to remove from the courts the power to decide whether this grievance is arbitrable under the new contract is that there is at least some possibility that it is. Whether this dispute is arbitrable under the new contract is an issue that the parties must submit in the first instance to the arbitrator" (Pet. App. A4). The court of appeals concluded that the arbitrability question in this case should be submitted to an arbitrator because it could not "say with positive assurance that the arbitration clause of [the 1982 collective bargaining agreement] is not susceptible to an interpretation that covers this dispute" (*id.* at A6).

Thus, instead of reviewing the district court's determination regarding the merits of the arbitrability issue, the court of appeals simply ascertained that there was some possibility that the dispute was arbitrable and left the arbitrator free to make the final

decision regarding the arbitrability of the dispute. The court of appeals thus permitted the arbitrator to determine his own jurisdiction, the precise result rejected by this Court in *AT&T Technologies* (see slip op. 7-8). The judgment of the court of appeals accordingly should be vacated and the case remanded so that the court of appeals may review the merits of the district court's determination regarding the arbitrability of the parties' labor dispute.

2. The court of appeals committed an additional error in this case. Although this Court need not consider the issue in view of the court of appeals' failure to reach the merits of the arbitrability question (*AT&T Technologies*, slip op. 8), we submit that the court of appeals also erred in relying upon the National Labor Relations Act to support its conclusion that the dispute regarding Hildabridle's discharge arguably is arbitrable under the 1982 collective bargaining agreement.

As a threshold matter, there is no justification for the court of appeals' apparent assumption that the definition of "employee" under the National Labor Relations Act somehow controls the arbitrability of the dispute between petitioner and the union. This Court reaffirmed in *AT&T Technologies* that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration" (slip op. 5 (citation omitted)).

The court of appeals did not find that the collective bargaining agreements between petitioner and the union make arbitrability dependent upon the statutory

definition of "employee" or that the agreements otherwise rely upon the meaning of the statute. The statute therefore has no bearing on the arbitrability issue in this case, and the court of appeals should have addressed the district court's determinations (see Pet. App. A11-A15) regarding the meaning of the arbitration clause contained in the 1982 collective bargaining agreement, and in the collective bargaining agreement that expired in January 1982.[4]

Instead of undertaking this inquiry, the court of appeals engaged in an erroneous analysis of the National Labor Relations Act. The court of appeals' conclusion that Hildabridle's discharge arguably is arbitrable under the 1982 collective bargaining agreement rested upon the premise that, under the National Labor Relations Act, "until there is an adjudication of a company's right to fire an economic striker [the striker] remains an employee" (Pet. App. A4). The court concluded that "Hildabridle was legally still in the status of employee when the strike ended and the new contract went into effect. The failure of the company to treat him as an employee under the new contract raised the issue of the propriety of his discharge under that agreement" (*ibid.*). Contrary to the conclusion reached by the court of appeals, however, it is well-settled that an economic striker discharged for strike-related misconduct does

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[4] In *Nolde Brothers, Inc.* v. *Local 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), this Court held that a dispute over the employer's obligation to pay severance pay under the expired contract, which arose after the termination of that contract, was arbitrable under the expired contract. Respondents dispute the district court's conclusion (Pet. App. A11-A14) that the expired contract did not require arbitration in the present case (Br. in Opp. 11-15).

not remain an "employee" within the meaning of the National Labor Relations Act.

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), provides that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." In *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), this Court considered whether employees discharged for engaging in an unlawful sit-down strike remained employees within the meaning of Section 2(3) and therefore were entitled to reinstatement at the conclusion of the work stoppage. The Court held that the workers were not entitled to reinstatement. It was "unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work" (306 U.S. at 255). Instead, "[w]hen the employees resorted to [unlawful conduct unprotected under the federal labor laws] * * * they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve" (*id.* at 256-257).

As Justice Stone stated in his concurring opinion, Section 2(3) should not be read to "depriv[e] the employer of his right * * * to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor prac-

tices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason—their discharge for unlawful practices which the Act does not countenance." 306 U.S. at 264; see also 29 U.S.C. 160(c) ("[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause"). Thus, a nondiscriminatory discharge effectively terminates—as of the date of the discharge—the dischargee's status as an "employee" within the meaning of the National Labor Relations Act.[5]

To be sure, it is an unfair labor practice to discriminatorily discharge an economic striker during the course of the strike and reinstatement is the appropriate remedy for that statutory violation (*NLRB* v. *International Van Lines*, 409 U.S. 48, 53 (1972)); and an unreplaced economic striker has a statutory right to reinstatement at the end of a strike unless the employer has a legitimate business justification for refusing reinstatement (*NLRB* v. *Fleetwood*

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[5] The Board has held that an employee discharged for cause during a strike is not entitled to reinstatement because, following such a nondiscriminatory discharge, the dischargee "lost his status as an 'employee' of the [employer]." *Acrylic Optics Corp.*, 222 N.L.R.B. 1105, 1106 (1976); see also *Woodlawn Hospital* v. *NLRB*, 596 F.2d 1330, 1333-1337 (7th Cir. 1979); *Dow Chemical Co.*, 212 N.L.R.B. 333, 341-342 (1974), remanded on other grounds *sub nom. United Steelworkers* v. *NLRB*, 530 F.2d 266 (3d Cir.), cert. denied, 429 U.S. 834 (1976). Contrary to the court of appeals' suggestion (Pet. App. A4), nothing in this Court's decision in *Fansteel* indicates that an adjudication of the propriety of the discharge must occur before the discharge may become effective.

Trailer Co., 389 U.S. 375, 378 (1967)). But the existence of these rights does not alter the fact that—in the absence of a reinstatement order issued by the NLRB—the nondiscriminatory discharge of a striking employee is effective at the time of the discharge.[6]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of this Court's decision in *AT&T Technologies, Inc.* v. *Communications Workers of America, supra.*

Respectfully submitted.

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[6] This conclusion is especially clear in the present case because the NLRB had an opportunity to consider the propriety of the discharge. The union filed unfair labor practice charges challenging petitioner's discharge of Hildabridle and the NLRB General Counsel declined to issue a complaint. Pet. App. A9. Thus, there was an administrative determination rejecting Hildabridle's claim to continued employee status.

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